


B.C. aboriginal title case

Background Paper

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# B.C. ABORIGINAL TITLE CASE
## (Delgamuukw v. The Queen)

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# B.C. ABORIGINAL TITLE CASE (*Delgamuukw* v. *The Queen*)

## INTRODUCTION

*Delgamuukw* v. *The Queen*, also known as the "Gitskan case," was decided by the Honourable Chief Justice Allan McEachern on 8 March 1991 in the Supreme Court of British Columbia. It is one of the most significant cases to have reached the courts on the question of aboriginal rights and aboriginal title to land. This is because the plaintiffs' claim to unextinguished aboriginal title involves questions of residual sovereign powers of First Nations, as well as property and land use questions.

The Gitskan case sets the government's conception of aboriginal title as a collective yet private property interest against the opposing view that aboriginal title involves some degree of indigenous sovereignty over the land -- that is, that it is a "pre-existing right" to use and occupy land as the plaintiffs' ancestors did, and includes the right to apply aboriginal customary law respecting land and resource regulation. The government's view of aboriginal rights (which the Court adopted) is that, as a "burden on the Crown's title," they are no more than a right to use and occupy Crown land for traditional subsistence and cultural purposes. This view denies the existence of any indigenous sovereignty over land or any other matter.

## SUMMARY OF THE PLAINTIFFS' CLAIM

This case was brought against the Crown in right of the Province of British Columbia by 35 Gitskan and Wet'suwet'en hereditary chiefs ("the plaintiffs"). Against the provincial Crown, the plaintiffs

claimed an unextinguished aboriginal title over a territory covering approximately 22,000 square miles in north-west British Columbia. This claim involved an assertion that from time immemorial the plaintiffs and their ancestors had occupied and possessed the territory in question; and that the Gitskan and Wet'suwet'en people were entitled to a legal judgment declaring they owned the territory and were entitled to govern the territory by aboriginal laws paramount to the laws of British Columbia. The Court dismissed these claims against the provincial Crown.

The Crown in right of Canada was added as a defendant at the request of the Province. Because the plaintiffs sought no relief from the federal government, the case against the federal Crown was dismissed.

The plaintiffs allege the territory is divided into 133 separate territories (98 Gitskan, and 35 Wet'suwet'en), and each of these separate territories was claimed by a hereditary chief for his House or its members. Mr. Justice McEachern described the plaintiffs as follows:

> The Gitskan are a Tshimshanic-speaking aboriginal people who claim generally the watersheds of the north and central Skeena, Nass and Babine Rivers and their tributaries within the territory. They number 4,000 to 5,000 persons, most of whom now live in the territory, mainly in villages alongside the Skeena River.....The Wet'suwet'en are an Athabaskan-speaking aboriginal people who claim areas mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako River systems and their tributaries immediately east and south of the Gitskan. They number about 1,500 to 2,000 persons. Most of the Wet'suwet'en live in the territory, mainly in two villages alongside the Bulkley River. (pp. 5-6)

The decision of Mr. Justice McEachern (the Chief Justice of the B.C. Court of Appeal, but sitting as a justice of the B.C. Supreme Court) summarized the plaintiffs' claim as follows:

> The Gitskan and Wet'suwet'en peoples allege that they and their ancestors have, from time immemorial, and well before the arrival of European influences or settlement, (sometimes called "contact") lived in, owned, controlled, possessed, and exercised jurisdiction over the territory. They further allege that they and their ancestors or predecessors, never having surrendered the territory by conquest or treaty, still

> enjoy aboriginal ownership of and the legal right to govern the territory according to their aboriginal laws which they claim are "paramount" to the law of British Columbia. (p.10)

Put another way, the plaintiffs first asserted an unextinguished aboriginal title and then argued that as a result of this title, some form of indigenous sovereignty or jurisdiction over the land remained, in the absence of a military conquest or treaty of cession.

In the alternative, the plaintiffs claimed aboriginal rights to use the territory and claimed damages for the loss of all lands and for resources transferred to third parties or removed from the territory since the establishment of the colony.

## THE COURT'S RULING

The Court held that aboriginal rights had been extinguished in the territory by virtue of colonial and provincial legislation that the Court viewed as inconsistent with the continued existence of aboriginal title. Such legislation was interpreted by the Court as a "clear and plain" intention of the Crown to unilaterally extinguish aboriginal title. Before the adoption of the *Constitution Act, 1982* affirming and recognizing aboriginal and treaty rights, the Crown had the power, in law, to do this. Whether or not the provincial Crown, as opposed to the federal Crown, could extinguish aboriginal title has been a matter of much legal debate. Equally controversial is the Court's finding in this case that aboriginal title was extinguished by virtue of provincial legislation "inconsistent" with aboriginal title.

Because the plaintiffs' argument on indigenous sovereignty and jurisdiction essentially hinged on aboriginal title, the sovereignty/jurisdiction claim failed as a result of the Court's finding that aboriginal title had been extinguished. Further, the Court's analysis of the law, and its treatment of the evidence, led to the conclusion that indigenous people had not exercised sovereignty even before the arrival of Europeans.

The only positive finding for the plaintiffs was that the provincial Crown has a fiduciary obligation towards indigenous people in the territory as a result of the unilateral extinguishment of aboriginal title (p.248). This duty was described as follows: "The Crown's obligation, in my judgment, is to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land" (p.248).

## SPECIFIC FINDINGS

### A. The Nature of Aboriginal Rights

The Court held that aboriginal interests can arise either (a) by occupation and use of specific lands for aboriginal purposes by a communal people in an organized society for an indefinite, long period prior to British sovereignty, or (b) under the *Royal Proclamation of 1763*. The Court found that the *Royal Proclamation* had never applied to or had any force in the Colony or Province of British Columbia or to the Indians living there.

The Court said aboriginal interests under (a) above, arise by operation of law and do not depend upon statute, proclamation or sovereign recognition. Such rights existing at the date of British sovereignty continue only at the Crown's pleasure. Unless surrendered or extinguished, aboriginal rights constitute a burden upon the Crown's title to the soil.

Chief Justice McEachern defined aboriginal rights in a general way as "rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them" (p.15).

## B. The Plaintiffs' Aboriginal Rights

The Court decided that linguistics, genealogy, history, and other evidence established that some of the ancestors of the plaintiffs or peoples they represent had been present in the territory for an indefinite, long period before British sovereignty.

The aboriginal interests of the post-contact ancestors of the plaintiffs at the date of [British] sovereignty were held to be those exercised by their remote ancestors for an indefinite, long period. Basically these were rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes. These aboriginal interests did not include ownership of, or jurisdiction over, the territory and such claims were dismissed by the Court.

But for the question of extinguishment, the plaintiffs' aboriginal sustenance rights would have constituted a legally enforceable, continuing burden upon the title of the Crown.

## C. Sovereignty

The Court held that the law of nations and the common law recognize the sovereignty of European nations that established settlements in North America.

It was decided that Great Britain asserted sovereignty in the territory not earlier than 1803, and not later than the Oregon Boundary Treaty, 1846, or the actual establishment of the Crown Colony of British Columbia in 1858. For the purposes of this case, it did not matter to the Court precisely when sovereignty was first asserted.

The judgment states that the title to the soil of the province became vested in the Imperial Crown (Great Britain) by operation of law at the time of sovereignty. The plaintiffs acknowledged this title but argued that their claims constituted a burden upon the title of the Crown.

The Court said the purpose of sovereignty and of creating the Colony of British Columbia in 1858 was to settle the land with British settlers and to develop it for the benefit of the Crown and its subjects. As mentioned above, the Court also held that the aboriginal interests of the post-contact ancestors of the plaintiffs at the date of British sovereignty were those exercised by their own remote ancestors and that these aboriginal interests did not include ownership of, or jurisdiction over the territory.

## D. Extinguishment of Aboriginal Title

The Court held that aboriginal rights exist at the pleasure of the Crown, and may be extinguished whenever the intention of the Crown to extinguish them is clear and plain.

Upon the establishment of the colony, the Crown, both locally and in London, enacted a number of laws providing: (a) that all the lands of the colony belonged to the Crown; (b) that the laws of England applied in the Colony; (c) that the Governor, and later a Legislative Council, had authority to grant the lands of the colony to settlers; and (d) that the Crown had the authority through the Governor to make laws and exercise legal jurisdiction over the colony including the territory. The Court construed these pre-Confederation colonial enactments as exhibiting a clear and plain intention to extinguish aboriginal interests in order to give an unburdened title to settlers. The Court held that the Crown therefore had extinguished such rights to all the lands of the colony. The plaintiffs' claims for aboriginal rights were dismissed.

In the Court's view, since Confederation the province has had: (a) title to the soil of the province; (b) the right to dispose of Crown lands unburdened by aboriginal title; and (c) the right, within its jurisdiction under s. 92 of the *Constitution Act, 1867* to govern the province. All titles, leases, licences, permits and other dispositions emanating from the Imperial Crown during the colonial period or from the Crown in right of the province since Confederation are valid so far as aboriginal interests are concerned.

## E. Fiduciary Duty of the Crown (In Right of the Province) to the "Indians"

Mr. Justice McEachern decided that at the same time as the pre-Confederation enactments implicitly extinguished aboriginal rights or title, the Crown promised the Indians of the colony that they, and all other residents, could continue to use the unoccupied or vacant Crown land of the colony for the purposes equivalent to aboriginal rights subject to the general law of the province and until such lands were required for an adverse purpose.

The Court held that the unilateral extinguishment of aboriginal interests accompanied by the Crown's promise and the general obligation to care for aboriginal peoples, created a legally enforceable fiduciary, or trust-like duty or obligation upon the Crown to ensure there would be no arbitrary interference with aboriginal sustenance practices in the territory.

The Court decided that the promise made and the obligation assumed by the Crown in colonial times, while not an interest to which Crown lands are subject, could only be discharged by the province and continues to the present time as a duty owed by the Crown, subject to the terms mentioned above. The province has a continuing fiduciary duty to permit Indians to use vacant Crown land for aboriginal purposes. The honour of the Crown imposes upon the province an obligation of fair dealing in this respect which is enforceable by law. The plaintiffs were accordingly entitled to a declaration confirming their legal right to use unoccupied, vacant Crown land for aboriginal purposes subject to the general law of the province.

The Court held that orderly development of the territory, including the settlement and development of non-reserve lands and the harvesting of resources, does not ordinarily offend against the honour of the Crown. The Court said this is because the province has many other duties and obligations in addition to those owed to Indians and because (a) the territory was so vast; (b) game and other resources were reasonably plentiful; and (c) most Indians in the territory were, in the Court's opinion, only marginally dependent upon subsistence activities.

Mr. Justice McEachern specified that the right of Indians to use unoccupied, vacant Crown lands is not an exclusive right and it is subject to the general law of the province.

The Court would not specify any precise rules governing the relationship between the Indians and the Crown, leaving this question to the law relating to fiduciary duties. The Court said that in determining whether there has been a breach of this fiduciary duty "the operative word is 'reconciliation' rather than 'rights' or 'justification'."

## ANALYSIS

This analysis will focus on some of the major issues arising from this complex case.

### A. Language

The media reported very strong reactions from the native community following the announcement of this decision. Objection was made, on racial and cultural grounds, to the analysis and language of the reasons for judgment.

In terms of language, the decision several times refers to "our Indian people," an expression that is rejected by First Nations as paternalistic. On page 112, the Court uses the term "Kaffirs" in referring to colonial policy in South Africa:

> On December 30, 1858 Lytton enquired of Douglas whether '...it might be feasible to settle [the Indians] permanently in villages; [where] civilization at once begins'. He pointed out that such had been accomplished with the Kaffirs at the Cape.

This term is considered a pejorative reference to black Africans. One authority has commented: "Someone holding extreme white supremacist views will often refer to Africans as 'kaffirs'."(1) *The Concise Oxford*

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(1) *The Apartheid Handbook*, 2nd ed. Penguin Books Ltd. Middlesex, England, 1986 at p. 23.

*Dictionary* (7th ed.) also indicates that the term has a racially offensive meaning by assigning to it the symbol "R" and the abbreviation "derog."(2)

The Court may have been repeating what was said in a piece of documentary evidence without quoting directly from it, but this is not clear. In any event, the difficulty arises from using this term at all in the actual text of the decision. These terms are cited here solely for the purpose of explaining the issue of racist terminology; in order to identify this issue, it seems necessary, unfortunately, to give some specific examples.

If the use of such a term is unavoidable, human rights concerns require it to be a clearly identified as a racial slur, in an anti-racist context. As one authority states, the use of terms clearly constituting racial slurs in any analytical exercise requires identification of their racially pejorative character at point of use - regardless of the motive for use.(3) A failure to "deconstruct" the racism inherent in racial slurs -- that is, to identify immediately their pejorative character and place them within an anti-racist context - is regarded as cloaking or perpetuating racial slurs under the guise of "neutral" intellectual inquiry.(4) In the context of aboriginal rights, the Supreme Court of Canada deconstructed racially discriminatory language in the text of a decision it quoted in the *Simon* case ([1985] 2 S.C.R. 387) by identification and rejection of an offending passage.

Human rights issues therefore arise in the Gitskan case from the Court's use of racially pejorative terms in the text of the decision and in its many quotations from historical documents and legal authorities that use abusive terminology in discussing indigenous peoples. Such terminology includes references to indigenous people as "savages," as

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(2) In the *Oxford Dictionary,* the symbol "R" is used to mean "racially offensive" and "derog." denotes "derogatory, used only contemptuously".

(3) Joanne St. Lewis, Education Equity Director, Faculty of Law, University of Ottawa.

(4) *Ibid.*

"primitive," and as lacking in "civilization," or reveals similar prejudiced assumptions about indigenous people as distinct races or cultures.

Human rights issues also arise from analyses suggesting that concepts with positive values such as "civilization" cannot be associated with indigenous peoples; for example, frequent quotations from legal and historical authorities suggest that "civilization" and "sophistication" are to be equated with European but not indigenous societies. Such authorities are quoted and relied on throughout the Gitskan case. A number of the Court's observations on aboriginal life and culture are regarded as objectionable for similar reasons. For example, Mr. Justice McEachern's general observation on aboriginal life prior to the arrival of Europeans was that "there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, 'nasty, brutish and short'" (p.13). Other examples are:

- "The evidence suggests that the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses, or wheeled wagons. Peter Skene Ogden, the controversial trader-explorer visited Hotset in 1836 and noted their primitive condition." (p. 25)

- "I have no doubt life in the territory was extremely difficult, and many of the badges of civilization, as we of European culture understand that term, were indeed absent." (p.31)

- "Warfare between neighbouring or distant tribes was constant, and the people were hardly amenable to obedience to anything more than the most rudimentary form of custom." (p.73)

The following passage in *Re Southern Rhodesia* (a 1919 decision of the Privy Council), quoted and referred to by the Court as demonstrating "much wisdom" (p. 226) also points to the need to "deconstruct" the language of quoted authorities:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute [to] such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe'. On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

A consistent and now controversial assumption of the historical and legal authorities quoted in the Court's reasons, is that human societies may be rated on a scale of "organization" running from "primitive" at one end to "sophisticated" at the other. "Civilization" is equated with the higher end of this scale and is more often associated with European societies, while "primitiveness" is associated with pre-contact indigenous societies. The extent to which Canadian law will recognize aboriginal rights is to some extent dependent upon this cultural judgment of how sophisticated or organized an indigenous society is or was. This type of analysis carries the inherent dangers of cross-cultural judgment. Its premise of ranking the "civilization" of indigenous societies on a scale based on European values alone may also be questioned as ethnocentric. Further, this analysis often involves quoting from sources containing racially offensive language that reflects the underlying bias of the historical and legal authorities available to the Court. This raises the policy issue of whether Courts, when discussing relevant legal precedent and historical evidence, should explicitly identify the offensive character of such language and reject it as inappropriate.

## B. Sovereignty

The legal question of whether any residual sovereignty rests in the Gitskan and Wet'suwet'en peoples involved an analysis of common law (case law) and the law of nations (international law). The analytical approach used in this case posed as a first question whether in law the indigenous peoples concerned had had a sovereign status before the arrival of Europeans.

For many indigenous people and indigenous rights advocates, simply posing this question is to cast doubt on the humanity of indigenous peoples. Another difficulty is that existing case precedent uses European society as the definitive norm to decide whether indigenous societies possessed a sufficiently "sophisticated" state of social and political organization to justify a recognition of indigenous sovereignty and of aboriginal title. Under the analysis used in the Gitskan case, indigenous societies are presumed not to have possessed a sufficient degree of organization for either military conquest or cession of sovereignty by treaty to be necessary to justify the initial assertions of sovereignty by European powers. The "doctrine of discovery" allows European powers to treat as unoccupied any lands inhabited by hunter-gatherer societies. This doctrine, originally developed in the colonial period to determine the rights of colonized peoples relative to the colonizing power, is based on assumptions of the European peoples' superiority to indigenous peoples. These inherent assumptions raise the issue of racial bias and ethnocentrism within the framework used to analyze aboriginal title/rights questions. This issue was not addressed by the Court.

In the Gitskan case, Justice McEachern felt compelled by precedent to rely on the doctrine of discovery. This analytical framework led him to conclude there was a lack of indigenous sovereignty at the time of contact, thus justifying British sovereignty over vast areas of land with minimal occupation by British subjects.

The Court was led to this analysis by some of the leading aboriginal title cases, such as *Hamlet of Baker Lake* v. *Minister of Indian*

*Affairs,* [1980] 1 F.C. 518 (F.C.C.), which in turn were influenced by colonial precedent from Africa (such as *Re Southern Rhodesia,* [1919] A.C. 211). The Court in the Gitskan case was also influenced by the American precedent *Johnson* v. *McIntosh* (U.S.S.C.), which accepted the doctrine of discovery. Mr. Justice McEachern in his decision quoted (at p.80) and seemed to accept the following passage from *Johnson* v. *McIntosh* (1823) 8 Wheaton 543 at 572-3, with no comment on its ethnocentric bias:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded by apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition which they all asserted, should be regulated among themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession...

Mr. Justice McEachern concluded that "Subsequent authorities make it clear that such sovereignty exists not just against other 'civilized' powers but extends as well to the natives themselves" (p.80). The Court also concluded: "In my view, it is part of the law of nations, which has become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of sovereignty" (p.81).

Case precedent also led the plaintiffs to make a fundamental admission that made the indigenous jurisdiction argument even more difficult: that the underlying title to the soil of the territory is in the Crown in right of the province of British Columbia *(St. Catherines*

*Milling and Lumber Co. Ltd.* v. *Attorney General of Ontario* (1886) 13 S.C.R. 577). This admission necessarily involves some recognition of British/Canadian sovereignty over the territory. The plaintiffs appeared to be arguing that a continuing aboriginal title (which the Court eventually held had been extinguished) meant a continuing indigenous jurisdiction over the land that displaced Crown jurisdiction in land matters at least.

The Court concluded that there was a lack of "law" in pre-colonial indigenous society, at one point describing this period as reflecting a "legal and jurisdictional vacuum" (p.222 ). The Court also said "If it were necessary to find the Gitskan and Wet'suwet'en, as aboriginal peoples rather than villagers, had institutions and governed themselves, then I doubt if this requirement has been satisfied. I have already discussed this earlier in this Part" (p. 226). These findings were critical to the Court's conclusion that aboriginal title or rights did not include any notion of residual sovereign powers.

While most of the analysis in Gitskan concludes a lack of indigenous law, and therefore a lack of indigenous sovereignty in pre-colonial times, the decision seems to offer two alternative explanations for the Court's negative finding regarding indigenous sovereignty: that is, that the assertion of British sovereignty by the establishment of the Colony of British Columbia either *displaced* or *extinguished* indigenous sovereignty. At page 241 the Court states:

> I discussed this claim [aboriginal jurisdiction] in Part 14 of this judgment and I concluded that aboriginal sovereignty did not survive the assertion of British sovereignty. I do not find it necessary to consider or decide whether the establishment of the Colony of British Columbia, for example, should be classified as a displacement of sovereignty by a different one which the law recognizes, or whether the legal arrangements which were put in place during the colonial period amounted to an extinguishment of the earlier sovereignty. I tend to think the former correctly describes the historical reality, then it would be my judgment that the Crown clearly and plainly intended, in the sense I have mentioned, to extinguish any aboriginal jurisdiction or sovereignty which survived the assertion of British sovereignty. This, of

> course, was accomplished by the governmental arrangements the Crown put in place during the colonial period which were clearly intended to apply throughout the colony and to bind everyone who lived there. It is inconceivable in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with power to legislate, took title to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown.

The Court also suggested that the *de facto* exercise of sovereignty by British colonial powers and the Canadian State, would defeat any indigenous claims to sovereignty: "The events of the last 200 years are far more significant than any military conquest or treaties would have been. The reality of Crown ownership of the soil of all lands of the province is not open to question and actual dominion for such a long period is far more pervasive than the outcome of a battle or a war would ever be. The law recognizes Crown ownership of the territory in a federal state now known as Canada pursuant to its Constitution and laws" (p.81).

Mr. Justice McEachern concluded that upon asserting sovereignty, the Crown also acquired an underlying title to the soil, subject only to aboriginal title in the form of a burden on the Crown's title. This burden did not prevent the Crown from selling the land, he said, or from extinguishing that burden at will.

On a number of matters, the Gitskan case has been criticized as out of step with recent Supreme Court of Canada decisions such as that in *Sparrow* v. *The Queen,* [1990] 1 S.C.R. 1075. The specific issue of indigenous sovereignty was not directly before the Supreme Court of Canada in *Sparrow.* Though that judgment did make a few remarks on the question, collectively, these remarks are somewhat ambiguous. For example, a finding contrary to indigenous sovereignty is suggested by the following passage in *Sparrow* (at p. 1103): "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was never any doubt that sovereignty and legislative power, and indeed underlying title, to such lands vested in the Crown; see *Johnson* v. *McIntosh....*"

On the other hand, the Court, in discussing the significance of s. 35 (1) of the *Constitution Act, 1982,* appears to quote with approval the following observations by Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L. J.* 95:

> ...the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown." (as quoted at p. 1106)

The Supreme Court of Canada touched on the subject of sovereignty in another recent case, *Sioui* v. *The Queen.* In that case, which dealt with the nature of treaty rights, the Court was again somewhat equivocal on the question of the sovereign status of First Nations in Canada. The Court noted that in a previous case, *Simon* v. *The Queen,* it had decided that treaties with Indians are unique documents, neither created nor terminated according to the rules of international law. In *Sioui,* it went on to conclude both that Indian nations maintained relations with Great Britain and France that were *close* to those maintained between sovereign nations. On the other hand, the Supreme Court of Canada in the same case concluded that "the Indians were regarded in their relations with the European nations which occupied North America as *independent* nations" [emphasis added] and that historical records "demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians." The Supreme Court of Canada also adopted the following statement about British policy towards Indian people in the mid-eighteenth century from the United States Supreme Court in *Worcester* v. *State of Georgia:*

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: *she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.* [emphasis added by the SCC].

In conclusion, a clear answer from the Supreme Court of Canada on the question of indigenous peoples' sovereignty may have to wait for a case in which it is raised in the context of aboriginal title, such as the Gitskan case.

## THE VANCOUVER ISLAND TREATIES

Most of British Columbia, and the territory in question in this case, is not covered by treaty. However, the earliest days of British presence on Vancouver Island through the Hudson's Bay Company involved a treaty process. The Court in the Gitskan case therefore had to deal with the issue of whether this treaty process represented British policy on aboriginal rights, and whether the land rights of indigenous people would remain throughout the province until dealt with by treaty. The Court answered these questions in the negative and went on to state:

> With respect, I think too much has been made of these treaties as there is no clear understanding of what was involved, and the reasons which motivated the parties to act as they did. The Hudson's Bay Company apparently decided to acquire aboriginal interests in land in which it is interested, and obtained such land for a few blankets....The Vancouver Island treaties may represent no more than the surrender of the Indians of whatever rights they had in exchange for the modest consideration they received together with the substitution of a treaty right to continue to use the land. It cannot be inferred that the Indians owned the land or that the Crown was obliged by law to enter into these or further treaties. This is all so uncertain and equivocal that I am unable to attach any legal consequences to these treaties. (p.124)

The Court expressed these conclusions without referring to or distinguishing several precedents that considered the Vancouver Island treaties. For example, in *Saanichton Marina Ltd.* v. *Claxton,* (1989) 57 D.L.R. (4th) 161, the B.C. Court of Appeal held that a 1852 treaty between the Saanich people and the governor of Vancouver Island on behalf of the Hudson's Bay Company conferred a positive right of protection upon the Indians of their right to fish in a particular location. As a result

of that treaty right, the Court of Appeal granted a declaration that a proposed marina would seriously interfere with the Indian fishery. The only barrier to granting an injunction appeared to be a statutory provision for Crown immunity.

In *Saanichton Marina,* the B.C. Court of Appeal expressly rejected an argument that the treaty was not binding on the Crown; holding that such a position was untenable in view of precedents such as *R.* v. *White* (196*A*), 50 D.L.R. (2d) 613; affirmed 52 D.L.R. (2d) 481n (S.C.C.) and *R.* v. *Bartleman* (1984), 12 D.L.R. (4th) 73 (B.C.C.A.). These precedents not only conclude that the Vancouver Island treaties do have legal consequences, but also seem to suggest that these treaties represent a British policy of obtaining land cessions by way of treaty in advance of settlement, and that this policy was intended to apply to British Columbia as well as other parts of Canada. For example, in *R.* v. *White,* Mr. Justice Davey stated: (p. 197-8)

> In the Charter granting Vancouver Island to the Hudson's Bay Co., it was charged with the settlement and colonization of that island. That was clearly part of the Imperial policy to head off American settlement of and claims to the territory. In that sense the Hudson's Bay Co. was an instrument of Imperial policy. It was also the long standing policy of the Imperial government and the Hudson Bay Co. that the Crown or the company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, were made with various bands and tribes of Indians for the purchase of their lands. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the Crown and the Hudson's Bay Co. in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard ex.8 as a mere agreement for the sale of land made between a private vendor and a private purchaser.

The most recent statements of the Supreme Court of Canada on Indian treaties *(Simon and Sioui)* seem to leave no doubt that these documents have legal consequences.

## EXTINGUISHMENT OF INDIAN TITLE

In *Calder* v. *A.G. for B.C.* [1973] S.C.R. 313, the Court was divided on the question of how aboriginal title may be extinguished. Mr. Justice Judson, speaking for himself and two others, held that alienation and other acts inconsistent with aboriginal title was sufficient. The opposing view was that an intention to extinguish must be "clear and plain." The fact that there have been two opposing views was noted by the Supreme Court of Canada in *C.P. Ltd.* v. *Paul* [1989] 1 C.N.L.R. 47.

In recent years, the Supreme Court of Canada has stated several times that although the Crown had the power before 1982 to extinguish unilaterally aboriginal title, such an intent must be expressed in a clear and plain fashion. (Since the enactment of s.35 of the *Constitution Act, 1982,* the extinguishment of any existing aboriginal title cannot be done without the consent of the aboriginal people concerned.) In *Sparrow,* the Supreme Court of Canada stated that: "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right" ([1990] 1 S.C.R.1099).

While these two views were described as being in opposition to one another in *C.P. Ltd.* v. *Paul,* the Court in the Gitskan case found a clear and plain intention to extinguish aboriginal title as a result of a clear and plain intention "to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished." The Court in Gitskan also concluded that an intention to extinguish may be discerned from a course of conduct over the whole of the colonial period. Mr. Justice McEachern stated: "I conclude that an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication" (p.241).

The Court held that express statutory language is not a requirement for extinguishment because the Supreme Court of Canada in *Sparrow* did not include express statutory language as a part of its test. In *Sparrow,* however, the Court made a distinction between a clear and plain

intent to extinguish and implicit extinguishment in the form of a statutory land regime apparently inconsistent with aboriginal title. Specifically, the Court adopted the "clear and plain" intention test, while contrasting it to the view of Mr Justice Judson in *Calder* that extinguishment could be achieved by a series of statutes evincing a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title (p. 10989 of *Sparrow).*

## CONCLUSION

There are many issues arising from this very significant and complex case. The Court's use of case precedent is of interest for a variety of reasons, some of which have been explained above. This case has demonstrated the very high evidentiary burden facing First Nations asserting an unextinguished aboriginal title and the complexity of the legal issues involved. It also demonstrates the important political issues underlying such cases. As Mr. Justice McEachern noted in the introduction to his judgment, "this has also been a political trial." The case gives an indication of the extent to which First Nations seek to transform legal and political institutions and thought, as these affect aboriginal rights and the status of First Nations in Canada.

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